

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion
Into the Fitness of the Officers, Directors, Owners
and Affiliates of Clear World Communications
Corporation, U-6039, Including Individual
Officers, Directors and Shareholders James,
Michael, and Joseph Mancuso, and Into the
Conduct of Other Utilities, Entities, or
Individuals (including Christopher Mancuso)
Who or That May Have Facilitated the Mancusos'
Apparent Unlicensed Sale of
Telecommunications Services.

Investigation 04-06-008
(Filed June 9, 2004)

**ADMINISTRATIVE LAW JUDGE'S RULING
STRIKING EX PARTE COMMUNICATIONS FROM THE RECORD FILE**

1. Summary

Clear World Communications Corporation (Clear World) moves for an order prohibiting the Consumer Protection and Safety Division (CPSD) and the legal staff of the Commission from engaging in ex parte communications with the assigned Administrative Law Judge (ALJ), and for sanctions for what Clear World alleges are repeated violations of the Commission's ex parte rules. This ruling finds that prohibited ex parte communications have been made by Commission personnel. It also finds that prohibited ex parte communications have been made by counsel for Clear World. This ruling directs that all such ex parte communications cease immediately, and that those communications that may have been made part of the correspondence file in this case be stricken and

removed. At hearing, any party may move to strike evidence shown to have been tainted by an ex parte violation.

2. Background

Clear World alleges that two written communications by Commission personnel were delivered to the ALJ in violation of the ex parte rules. The first was an e-mail message with an attached letter dated August 13, 2004, sent to Clear World counsel by CPSD counsel, with a copy to the ALJ and others. The e-mail message conveys what CPSD calls a “meet and confer letter.” The attached letter deals with the outcome of depositions conducted by CPSD the day before, the alleged failure of Clear World to respond to information requests, and the likelihood of another motion to compel.

The second written communication is a letter dated August 17, 2004, addressed to the ALJ and signed by the director of CPSD and an assistant general counsel of the Commission’s Legal Division. The letter acknowledges an earlier ALJ Ruling and, in apparent disagreement with that ruling, conditions CPSD’s settlement posture on Clear World’s compliance with discovery demands.

Clear World contends:

It is obvious that [CPSD’s] e-mail (with attachment) was a patent attempt to prejudice Judge Walker against Clear World. It is obvious that the August 17, 2004 letter from CPSD and the Legal Division, hand delivered to Judge Walker, was [a] blatant attempt to pressure and coerce Judge Walker into reversing his Ruling on the Motion to Compel. It is obvious that the August 17, 2004 letter informed Judge Walker that the CPSD *did not intend to comply fully* with the Court’s Ruling. Certainly *no letter would have been necessary* if the CPSD intended to fully comply with the Court Ruling. It is obvious that the August 17, 2004 letter was intended to allow the CPSD to refile its Motion without first engaging in good faith and meaningful settlement negotiations with Clear World as required by

the Court's Ruling. (Clear World Motion, at 2-3; emphasis in original; footnote omitted.)

While Clear World objected directly to CPSD about these communications, Clear World states that it was unable to write to the ALJ to challenge CPSD statements without itself violating the ex parte rules. Its objections, therefore, are filed in this motion for an order and sanctions.

CPSD responds that the two communications were not ex parte "under any accepted understanding of that phrase" because the communications with the ALJ "were copied to all active parties, specifically including Respondents." (CPSD Response, at 1.) CPSD also argues that the communications addressed procedural matters, including a meet and confer requirement, selection of a mediator and CPSD's position on prerequisites to settlement.

This ruling takes official notice that Clear World counsel has copied the ALJ on at least five communications to others, delivering the messages to the ALJ via facsimile transmission. These communications include a three-page letter dated July 2, 2004 to the Executive Director seeking an extension of time and criticizing CPSD document production; a four-page letter dated July 12, 2004 to the General Counsel outlining objections to a CPSD notice of deposition and data request; a two-page letter dated July 13, 2004 to the General Counsel correcting an error in the July 12 letter; a three-page letter dated July 13, 2004, to the Assistant Executive Director seeking an extension and criticizing CPSD document production; and a two-page letter dated July 14, 2004 to CPSD counsel demanding additional document production. For the most part, these communications dealt with substantive matters and were received after this proceeding had been categorized by the Commission on June 9, 2004 as adjudicatory.

CPSD notes that Clear World also has copied Assigned Commissioner Brown on some of its communications.

3. Analysis

Rule 7(b) of the Rules of Practice and Procedure states “In any adjudicatory proceeding, ex parte communications are prohibited.” The Commission categorized this Order Instituting Investigation (OII) as an adjudicatory proceeding on June 9, 2004 (OII, Ordering Paragraph 17), and Assigned Commissioner Brown repeated the designation in a Scoping Memo issued on August 4, 2004. The definition of “ex parte communication” is set forth in Rule 5(e):

“Ex parte communication” means a written communication (including a communication by letter or electronic medium) or oral communication (including a communication by telephone or in person) that:

- (1) concerns any substantive issue in a formal proceeding,
- (2) takes place between an interested person and a decisionmaker, and
- (3) does not occur in a public hearing, workshop, or other public setting or on the record of the proceeding.

Communications limited to inquiries regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information are procedural inquiries not subject to any restriction or reporting requirement in this Article.¹

¹ *See also* Pub. Util. Code § 1701.1(c)(4): “‘Ex parte communication,’ for purposes of this article, means any oral or written communication between a decisionmaker and a person with an interest in a matter before the commission concerning substantive, but

Footnote continued on next page

The ex parte rules are complex, since different rules apply to different types of proceedings. Obviously, there has been confusion on applicability of the ex parte rules in particular proceedings. CPSD counsel in its response to Clear World counsel denied that CPSD's e-mail communication violated ex parte rules because "[t]here is a written record, which can be included in the Commission's correspondence, and you [Clear World counsel] were copied, as evidenced by your response to same." (E-mail response dated August 18, 2004.) Counsel obviously refers to the rules governing *ratesetting* proceedings, which permit written communications to the ALJ with same-day copies to all parties (Rule 7(c)(3)), as opposed to *adjudicatory* proceedings, which do not permit such communications (Rule 7(b)).

By the same token, Clear World in its motion relies on Rule 1.1 for its definition of "ex parte communications," whereas the correct reference is to Rule 5(e), which is applicable to proceedings filed after January 1, 1998.² Rule 1.1, which is superceded by Rule 5(e) for later proceedings, states: "'Ex parte communication' means a written or oral communication on any substantive issue in a covered proceeding, between a party and a decisionmaker, off and the record and without opportunity for all parties to participate in the communication." CPSD makes the same error in its response, analyzing Rule 1.1 instead of Rule 5(e).

not procedural issues, that does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding on the matter."

² Rule 1.1 is contained in Article 1.5, which is labeled "Ex Parte Communications in Those Proceedings Not Subject to Article 2.5." Rule 5(e) is contained in Article 2.5, which is labeled "Rules and Procedures Applicable to All Proceedings Filed After January 1, 1998, and to Some Proceedings Filed Before January 1, 1998."

Most of the communications at issue here were prohibited ex parte communications, since they dealt with substantive matters that may come before the Commission or the ALJ as issues at hearing or as motions before and during hearing. The communications took place “between an interested person and a decisionmaker” and did not “occur in a public hearing, workshop, or other public setting or on the record of the proceeding.” (Rule 5(e).)

The prohibitions on ex parte communications in adjudicatory proceedings are mandatory. They serve sound principles of due process and fair hearing. They seek to prevent impropriety and the appearance of impropriety. They seek to eliminate off-the-record communications in which there is no opportunity for all parties to participate in the communication. They avoid the inference, as here alleged, that a party seeks to influence or intimidate a decisionmaker.

The ex parte communications at issue here copied in opposing parties and, as such, were not as egregious as the worst sins that the rule is designed to curtail. Since all of the parties named in this motion have violated the ex parte rules with respect to an adjudicatory proceeding, and since the violations appear in part to be based on an erroneous reading of the rules, this ruling does not impose sanctions. Instead, it directs that all such ex parte communications cease, and that those communications that may have been made part of the correspondence file in this case be stricken. At hearing, any party may move to strike evidence shown to have been tainted by an ex parte violation.

IT IS RULED that:

1. The Motion of Clear World Communication Corporation for an Order Enforcing Rule 7(b) and for Sanctions for Improper Ex Parte Communication to Administrative Law Judge Walker is granted to the extent set forth below.

2. Ex parte communications to the Administrative Law Judge or other decisionmaker by any party to this proceeding shall cease immediately.
3. Ex parte communications that have been made part of the correspondence file in this proceeding are stricken and removed.
4. At hearing, any party may move to strike evidence shown to have been tainted by an ex parte communication.

Dated August 31, 2004, at San Francisco, California.

/s/ GLEN WALKER

Glen Walker
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Striking Ex Parte Communications from the Record File on all parties of record in this proceeding or their attorneys of record. In addition, service was also performed by electronic mail.

Dated August 31, 2004, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.